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IN THE

Supreme Court of the United States

October Term, 1961.

No. 582

LLOYD BRASILEIRO PATRIMONIO NACIONAL,
Petitioner,

v.

MURPHY-COOK & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

T. E. Byrne, Jr.,
21 South Twelfth Street,
Philadelphia 7, Pa.,
Attorney for Petitioner.

Joseph P. Green,
Krusen, Evans and Byrne,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

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v.

MURPHY-COOK & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner, Lloyd Brasileiro Patrimonio Nacional, hereinafter "Brasileiro", respectfully prays that this Honorable Court may grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review a final judgment of that court entered July 6, 1961, in which a petition for rehearing, timely filed, was denied—August 23, 1961—with a dissent by Chief Judge Biggs.

OPINIONS BELOW.

The district court filed no opinion upon the motions of the defendant for judgment notwithstanding the verdict and or for a new trial. It simply entered an order denying these motions [78a]. The opinion of the court of appeals is reported 294 F. 2d 32 and is set forth in an appendix to this petition.

The original decision of the court of appeals was filed July 6, 1961. A petition for rehearing was denied August 23, 1961, with a dissenting opinion by Chief Judge Biggs.

JURISDICTION.

The judgment of the court of appeals for the third circuit affirming the judgment in favor of the respondent and against this petitioner was entered July 6, 1961.

Pursuant to the rules of the court of appeals for the third circuit a petition for rehearing was timely filed and was denied August 23, 1961.

The time within which this Petition may be filed was extended pursuant to 28 U. S. C. A. 2101[c] until December 1, 1961 by order of Mr. Justice Brennan entered November 18, 1961. Jurisdiction to consider the within Petition is conferred upon this Court by 28 U. S. C. A. 1254(1).

STATEMENT OF QUESTIONS INVOLVED.

In an action for damages by reason of personal injuries wherein a longshoreman has recovered a verdict against the original defendant [shipowner] upon grounds of alleged unseaworthiness of a piece of ship's equipment [cargo winch], in which action the stevedore has been joined as a third party defendant by the shipowner seeking indemnity:

A. Is the shipowner precluded from indemnity as against the stevedore because the shipowner defended against the plaintiff's claim upon the ground that the claimed unseaworthiness did not in fact exist? [Answer is in the affirmative by the court below.]

B. Is not indemnity recoverable by a shipowner from a stevedore where, with knowledge that a malfunctioning condition has arisen, the stevedore continues to use the malfunctioning equipment and it

eventually causes injury because of its defective condition? [Answered in the negative by the court below.]

C. Under the facts of this case, was not the shipowner entitled to have its cause of action for indemnity submitted to the jury under an instruction incorporating the "bringing into play" concept approved by this Court in *Crumady v. Fisser*?[1] [Answered in the negative by the court below.]

STATEMENT OF THE CASE.

The original suit was brought[2] by Hodgson, a longshoreman, against Lloyd Brasileiro Patrimonio Nacional [Brasileiro], a shipowner. Hodgson sought damages for personal injuries received while working on board Brasileiro's ship LOUIE CUBA on December 19, 1956. He alleged that his injury occurred because one of the ship's winches did not operate properly. Brasileiro joined the stevedore, Hodgson's employer, Murphy-Cook & Company [Murphy] as a third party defendant and alleged it was entitled to indemnity because Hodgson's injury was caused by the failure of Murphy to perform properly the work it had undertaken to load cargo upon Brasileiro's ship.

Brasileiro's ship arrived in the port of Philadelphia the previous day, December 18, 1956. Employees of Murphy worked on it all night and finished the loading which was to be done at that particular pier by 4:30 a.m. on December 19th. The last hatch to be loaded at the first pier was the one at which the accident later occurred. The ship shifted to another pier within the Philadelphia harbor area, from Philadelphia to its suburb, Chester. The same winches were used at both Philadelphia and Chester.

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1. *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423 at 427 and 429.

2. Federal Court civil jurisdiction was properly founded upon 28 U. S. C. A. 1332(2). Plaintiff was a citizen of the United States; defendant a Brazilian corporation.

The plaintiff's evidence was that when he and his fellow employees at Chester began to use the winch at 9:00 a.m. on December 19th, the winch did not operate properly. Plaintiff's evidence was that a member of the ship's crew was called; that he did some work about the winch and then signalled "O.K.". There was no allegation of any extensive conversation because of the language barrier between the Portugese-speaking crew members and the English-speaking longshoremen.

As soon as the longshoremen began using the winch after the attempted repair they learned that, whatever adjustments may have been made by the crew member, the condition of which they had complained was not corrected. Nevertheless, they continued to use the winch. These longshoremen, all employees of Murphy, admitted that all during this period no further attempt was made to notify any of the ship's crew that the attempted adjustment of the winch had not successfully corrected the condition of which they had complained earlier. After the expiration of a period of time, the accident occurred, and it was allegedly due to this same condition of the identical winch.

Brasileiro's evidence contradicted that submitted by the plaintiff. It denied that any complaint had ever been made to any of its officers or crew concerning the winch in question; denied that any adjustments or repairs had been requested or made; and alleged that the injury to the plaintiff was due entirely to improper operation of the winch by Murphy's employees.

At the trial the court submitted a series of written interrogatories[3] to the jury. In answering them, the jury found that the winch was not in safe working order at the time of the accident; that this rendered the ship unseaworthy; and that the unseaworthiness was a substantial factor in causing the plaintiff's injuries. The jury further found that the defendant-shipowner was not negligent, and

3. Reproduced herein at p. 13.

that Murphy-Cook & Company had performed its work properly. The court of appeals ignores the fact that the jury finding of proper performance by Murphy is meaningless because of the charge and because no one ever contended that Murphy *caused* the unseaworthiness.

In charging the jury the court had said that it could find in favor of Brasileiro and against Murphy upon the indemnity claim if the jury found that the unseaworthy condition of the winch was caused or created by the actions of the longshoremen in the employ of Murphy. 294 F. 2d 32 at 36. It specifically refused a request to charge [67a-68a] that Brasileiro would be entitled to indemnity if "their work brought into play an unseaworthy condition that may have existed".

The jury having found in favor of the injured plaintiff, Brasileiro paid the judgment and took an appeal only as to its indemnity action. The circuit court apparently proceeded to make findings of its own. It held that because a crew member had said, "O.K. go ahead" after the attempted repair of the winch, the shipowner was precluded from indemnity because of what that court said was the "assurance" by the shipowner to the stevedoring company that the known defects had been repaired. 294 F. 2d at 35. Such a question had never been submitted to or passed upon by the jury. On the contrary, the jury had specifically found that the shipowner had not been negligent.

The court of appeals further held that the shipowner was not entitled to a jury instruction upon the concept of "bringing into play"[4] because it had defended against the plaintiff's original claim upon the ground that an unseaworthy condition did not in fact exist. 294 F. 2d at 36.

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4. *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423 at 428-429.

REASONS FOR GRANTING THE WRIT.

In *Crumady v. The Joachim Hendrik Fisser*, this Court said:

> "We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over."

In *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*[5] this Court said:

> "If in that regard respondent [the stevedore] rendered a substandard performance which led to foreseeable liability of petitioner [shipowner], the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery."

In our case we start with the proposition that Brasileiro was held liable to the injured plaintiff solely upon the ground of unseaworthiness. The jury finding that the shipowner was not negligent has taken that possible ground of liability out of the case. There is, therefore, no finding that the events and the conversation quoted from the testimony, 294 F. 2d 34 and 35, upon which the court of appeals relies, ever took place. The conversation had been asserted by one side and denied by the other. If the jury had accepted it, it is at least difficult to reconcile a jury finding of no negligence. Even assuming, arguendo, that the conversation in fact took place, the court of appeals was not entitled to place its own interpretation upon it in view of the specific finding of the jury that the shipowner, including its crew members, had not been guilty of negligence. Assuming, again arguendo, the very worst interpretation that can be placed upon the testimony which the court of appeals quotes in its opinion, a winch which had been in good condition and operated properly all during the evening of December 18th and

5. 355 U. S. 563 at 567.

the early morning hours of December 19th began to malfunction. A foreign-speaking crew member was called who made an adjustment or repair but was not negligent in doing so and was not negligent in advising the operator of the winch that it was then all right to operate it. Thereafter the employees of Murphy, with positive knowledge that the winch was not operating properly, and was so operating that it was likely to cause injury to longshoremen handing heavy drafts of cargo in the ship's hold, continued to work with this same winch for a period of time variously estimated from a minimum of "ten to fifteen minutes" [28a, 35a]; "perhaps twenty minutes" [20a] and up to thirty minutes, and that during that time they made no attempt to recall the repairman or to bring the fact of malfunction of the winch to the attention of the ship's officers or crew.

Nevertheless, the court of appeals held not only that this precluded the shipowner from obtaining indemnity by operation of law, but also that the shipowner was precluded from having submitted for jury determination the question whether Murphy was performing its stevedoring contract in a workmanlike manner when its employees continued to operate a winch which they knew was not operating properly.

The holding in the case at bar is not only in conflict with the decisions of this Court but is in clear conflict with decisions in other circuits. For example, it conflicts with the statement of the law made by the court of appeals for the fourth circuit:

> "In short, he [stevedore] must not assume that a safe condition exists when he has notice that such may not be the case". *Smith v. Jugoslavenska Linijska Plovidba*, 278 F. 2d 176 [C.A. 4, 1960].

The court of appeals for the second circuit reversed a district court which had entered judgment for indemnity against a stevedore. Its reason for the reversal is stated in the following language:

> "Absent knowledge or constructive notice . . ., the stevedore could only have breached its contractual duty if the conduct of its employees created the dangerous condition." *Caldorola v. Cunnard S. S. Co.*, 279 F. 2d 475 at 478 [C. A. 2, 1960].

In *Hugev v. D/S Internationale*, 170 F. Supp. 601, the factual background [except such differences as arise because that case involves a hatch beam and our case involves a winch] is indistinguishable from that of the case at bar. The court there said:

> "The stevedoring company's implied in fact contractual obligation to perform its duties with reasonable safety embraces not only the handling of cargo but 'the use of equipment incidental thereto' as well. 355 U. S. at page 567. It includes also the duty to suspend the loading or unloading operations on its own initiative, and thus to avoid injury or damage, whenever the stevedore realizes that it would be unsafe under the circumstances to proceed." 170 F. Supp. 601 at 608.

The decision in *Hugev* was affirmed sub nom. *Metropolitan Stevedoring Co. v. D/S Internationale*, 274 F. 2d 875. [C. A. 9, 1960] and this Court denied certiorari, 363 U. S. 803.

The district court for Oregon understands the law quite differently, as demonstrated by the following:

> "This actual knowledge by the stevedore, even though independently obtained, intervenes and washes out any nonfeasance of petitioner in performing their implied in-fact contractual duty to stevedore. The petitioners [shipowner] owed no duty to restrain the stevedore from acting or using gear in the face or disregard of a known defect or danger. This is exactly what the stevedore did when it used with full knowledge of its condition the malfunctioning lift gear in connection with and incidental to the handling of the ship's cargo

pursuant to its contract. The inevitable failure of the gear and resulting injuries to persons in the ship's service was most probable and reasonably foreseeable by an expert stevedore. This foregoing conduct of the stevedore does not carry to and falls short of meeting the requirement that the stevedore use gear necessary and incidental to the working of the ship's cargo with reasonable safety as tested by stevedore expertise." *Weigel v. The Belgrano*, 188 F. Supp. 605.

It is implicit from the dissent by Judge Biggs upon petition for rehearing that he recognizes that the third circuit continues to operate under a misconception of the law applicable to a shipowner's action against a stevedore for indemnity, and that the misconception stems from that court's earlier decision in *Haggans v. Farrell Lines, Inc.*, 237 F. 2d 477 [C. A. 3, 1956]. This Court has had occasion to examine and reverse several third circuit decisions upon the indemnity question. See *Crumady v. Fisser*, 358 U. S. 423 and *Waterman S. S. Corp. v. Dugan & McNamara, Inc.*, 364 U. S. 421. In the latter case this Court said:

> "The warranty may be breached when the stevedore's negligence does no more than call into play the vessel's unseaworthiness. Crumady v. The J. H. Fisser, 358 U. S. 423, 429." 364 U. S. 421 at 423.

If this is the law, and we submit that it is, then the shipowner is at the very least entitled to have the jury consider the point under proper instructions. This the district court failed to do and the third circuit has upheld that refusal upon the ground that the shipowner defended the plaintiff's action against it upon the ground that the accident was not due to unseaworthiness. But this is contrary to the jury's special finding which was the basis of the judgment which was entered for the plaintiff and has been satisfied. The defense to plaintiff's claim here was exactly the same as the shipowner's defense in *Crumady v. Fisser*. See 142 F. Supp. 389 at 391 [2nd column] where the district court sets

out the contention of the vessel owner in that case, yet this Court awarded indemnity. We submit that the holding below is at variance with prior decisions of this Court and with decisions in other circuits. In addition to those already cited, the following are examples of cases which are contrary to the holding below: *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 392 at 401 [C. A. 2, 1954].

> ". . . but it [stevedore] was fully aware of the condition of the ship's equipment and failed to take proper precautions. . . . Cyprien [shipowner] was legally entitled to indemnity . . ."

Where a district court has relied specifically upon the third circuit's holding in *Hagans v. Farrell Lines, Inc.*, it has been reversed. See *Olszczuk v. Calmar v. Nacirema*, 164 F. Supp. 628; reversed 266 F. 2d 79 [C. A. 4, 19]; cert. denied 361 U. S. 816 and where a district court refused to follow the third circuit's decisions, it has been affirmed. *Revel v. American Export Lines*, 162 F. Supp. 299; affirmed 266 F. 2d 82. See particularly the specific disapproval of the third circuit's *Hagans doctrine*, 162 F. Supp. 288.

Now the court below has carried the concept a step further. It has not only accepted and based a holding upon testimony which was apparently rejected by the jury, but has written a completely unwarranted exception into the law of indemnity where a shipowner has defended by a denial of unseaworthiness.

If this is to be the rule, it will have a direct and significant bearing upon a vast volume of litigation pending in lower courts where maritime actions are brought in great numbers. Is every defendant who denies initial liability to be thereby precluded from an action for indemnity? If not, what is the basis for the selectivity? The court below provides no answer. Actions such as this, longshoreman versus shipowner versus stevedore are prolific of litigation in the maritime field, yet the results of litigation within the third circuit are drastically different than in others circuit

because different rules are applied. Now the rule is that if the owner denies unseaworthiness, he is precluded from indemnity. It does not matter that the jury found an unseaworthy condition to exist. If the owner defends by "denying the existence of an unseaworthy condition that could have been called into play"[6] he is not even entitled to jury consideration of his indemnity action.

Because of the large number of cases of this sort originating within the third circuit, it is respectfully submitted that the rules it applies, in apparent contravention of holdings of this Court, should be examined and the judgment below reversed.

Respectfully submitted,

T. E. Byrne, Jr.,
Attorney for Petitioner.

Joseph P. Green,
Kruesen, Evans and Byrne,
Of Counsel.

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6. Opinion below. 294 F. 2d at 30, herein at p. 20.

Appendix

INTERROGATORIES TO JURY.

1. Do you find that the winches at No. 4 hatch were in safe working order at the time of the accident? No X

2. If you find that the winches at No. 4 hatch were not in safe working order at the time of the accident, did their unsafe condition make the ship unseaworthy? Yes X

3. If your answer to No. 2 was "yes", was the unseaworthiness of the ship a substantial factor in causing the injuries sustained by the plaintiff? Yes X

4. Do you find that the shipowner was negligent in failing to provide the plaintiff with a reasonably safe place to work? No X

5. If your answer to No. 4 was "yes", was this negligence the proximate cause of the accident? Not answered
Yes——No——

6. Do you find that the plaintiff himself was negligent?
No X

7. If your answer to No. 6 was "yes", was his own negligence a contributing factor in the accident?
Not answered
Yes——No——

8. If your answer to No. 7 was "yes", what percentage of his own negligence contributed to the accident?
Not answered
——%

9. Did the third-party defendant, Murphy-Cook & Co. through its agents, servants, employees or representatives perform their work in a workmanlike, safe and proper manner? Yes X

10. If your answer to No. 9 was "no", was their failure to properly perform their work a substantial factor in making the ship unseaworthy? Not answered
Yes——No——

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 13,397

JAMES HODGSON

v.

LLOYD BRASILEIRO PATRIMONIO NACIONAL,
Appellant,

v.

MURPHY-COOK & CO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 21, 1961

Before KALODNER, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 6, 1961)

By STALEY, *Circuit Judge.*

On this appeal we are called on to determine a shipowner's right to indemnity from a stevedoring company for damages paid to a longshoreman for personal injuries sustained during the loading of a ship.

James Hodgson, a longshoreman employed by Murphy-Cook & Company, the stevedoring company, commenced an action against Lloyd Brasileiro Patrimonio Nacional ("shipowner") for personal injuries inflicted on him aboard its ship during a loading operation. The theory of Hodgson's suit was that the ship was unseaworthy and that the shipowner was negligent in failing to maintain or inspect a winch used in loading, or to warn him of its dangerous condition. The winch, operated by an employee of the stevedoring company, was part of the gear supplied by the shipowner under its written stevedoring contract. The evidence showed that on the day of and immediately prior to the accident, the brakes of the winch failed to hold, causing drafts to drift past their target. Hodgson was injured when a crate being lowered into the ship's hold struck him as the draft failed to stop when the brakes were applied.

The shipowner joined the stevedoring company as third-party defendant and maintained in the district court that Hodgson's injury was caused by a failure to properly use the winch, i.e., that the stevedoring company failed to perform its work in a safe, proper and workmanlike manner. Hodgson introduced evidence to show that the accident was caused by a defectively operating winch. The jury, in answer to a special interrogatory, found that the shipowner was not guilty of negligence but, based upon a finding of unseaworthiness, made an award in favor of Hodgson against it. That award has been satisfied and is not now before us. However, the district court's refusal to grant the shipowner's motion to enter judgment in its behalf against the stevedoring company or, alternatively, to grant a new trial form the basis for this appeal.

The shipowner contends that it is entitled to indemnity as a matter of law because the stevedoring company, once it became aware of defects in the winch, should have ceased using it until repaired. Relying on several recent Supreme Court decisions, the shipowner also asks this court

to overrule its decision in Hagans v. Farrell Lines, Inc., 237 F.2d 477 (1956).[1] In this regard, it asserts that the issue here is not whether a contractual right of indemnity existed, but, more precisely, what is the "effect of the admittedly existing contract." In the alternative, the shipowner contends that it is entitled to a new trial because of an erroneous charge to the jury.

Under the contract, the stevedoring company was required to "provide all necessary stevedoring labor, including winchmen, * * * and such other stevedoring supervision as are needed for the proper and efficient conduct of the work." It also served to impose upon the shipowner the duty to supply "booms and adequate winches, in good order and with sufficient steam or current for their efficient operation * * *." Under this agreement, the stevedoring company was not required to act as an insurer against any loss that the shipowner might suffer, or to maintain the winches. Calderola v. Cunard S.S. Co., 279 F.2d 475 (C.A.2), cert. denied, 364 U.S. 884 (1960). Rather, such language constitutes a contractual undertaking by the stevedoring company to perform its services in a workmanlike, proper and reasonably safe manner. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 565 (1958); Calderola v. Cunard S.S. Co., supra. Whether the stevedoring company's conduct constituted a breach of this provision was, of course, a question of fact for the jury. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., supra.

The shipowner candidly concedes that if our decision in *Hagans* "is still good law," its contention, that the judgment must be reversed as a matter of law, cannot prevail. What makes this case different, however, is that in *Hagans* we held, as a matter of law, that there was no right

1. The shipowner refers us to Waterman S. S. Corp. v. Dugan & McNamara, Inc., 364 U. S. 421 (1960); Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423 (1959); and Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124 (1956).

to indemnity, whereas here, the contractual right to indemnity is admitted, but the jury, in a special interrogatory submitted to it, found that the stevedoring company had performed its services in a "workmanlike, safe, and proper manner." Faced with this fact, the shipowner in effect then takes the position in its reply brief that this finding is against the weight of the evidence. The shipowner forgets that an appellate court will not interfere with a judgment entered on a verdict returned by a jury simply because of its opinion as to the weight or preponderance of the evidence. Liberty Mutual Insurance Co. v. Thompson, 171 F.2d 723 (C.A.5, 1948); Harnick v. Lilley, 167 F.2d 159 (C.A.8, 1948); 5 Moore's Federal Practice ¶ 38.08(5), p. 89. In any event, that finding is fully supported by the record. In light of this, we certainly cannot say that the shipowner was entitled to judgment as a matter of law.

The accident occurred at approximately 9:30 A.M. on December 19, 1956. Danelli, the winch operator, testified that shortly after he commenced work on that day it became apparent that the brake on the winch was not properly functioning and that it slipped, causing drafts to drift past their target. He immediately notified one Horan, a hatch foreman for the stevedoring company, who, in turn, obtained a member of the ship's crew to repair the winch. It will be recalled that the shipowner was obliged to maintain the winches under the stevedoring contract. Another longshoreman, called as a witness for Hodgson, testified that the following then occurred:

> "Q. What did you see with respect to anyone working on the winches?
>
> "A. One of the crew members, whether he was the electrician or not I don't know, but you ordinarily do not get an electrician to repair the winches when you have difficulty with them. So one of the crew members was working on the winches and he was talking to Mr. Danelli at the time, to keep working them so he could make the proper adjustment.

"Q. Did you observe approximately how long he worked on the winches?

"A. We weren't held up over five or ten minutes at the most.

"Q. Did you see where he was working on the winches?

"A. Yes, he was directly behind the winch on the opposite side from where I was standing.

* * *

"Q. Did you see what if anything he did?

"A. No, I couldn't. I know he had the cover off of it, which he had to take off to work on it. Whether he worked on the brakes or the electrical part I don't know, but they are both in the same place where he was standing and working on.

"Q. Did you observe whether he used any tools?

"A. He had tools in his hand when he went there, yes, sir.

"Q. Were you present after he performed his work on the winch?

"A. Yes, sir.

"Q. Did you observe what if anything he did or remarked in your presence after he had worked on the winches?

* * *

"A. He was talking to the winchman while he was operating and he told him it was O.K.

"By the Court:

"Q. This was in your presence?

"A. Sir?

"Q. This was in your presence?

"A. Yes, sir.

"Q. And he was a member of the crew, did you say?

"A. Yes."

The winch operator testified as follows on what the crew member who repaired the winch said to him:

> "Q. Did he have any words with you at any time; did he speak with you?
>
> "A. He all the time—when he spoke to me—when he said—he said, 'O.K., go ahead,' he said.
>
> "Q. When he said, 'O.K., go ahead,' did you then operate the winch?
>
> "A. That's right."

He also said that the accident happened either after the very first or second attempt to raise a load following these events. He went on to say that the winch continued to drift after the repair work had been done, and that only ten or fifteen minutes elapsed before the accident occurred. Thereafter, a deck engineer repaired the winch which then operated properly and efficiently for the remainder of the loading operation.

It was for the jury to determine whether it was unworkmanlike for the stevedoring company to continue operating the winch, which it knew had been defective, after receiving a categorical assurance from the shipowner's crew that it was "O.K." The same can be said for the shipowner's argument that the stevedoring company, even before the accident, knew that the winch was defective and that efforts at repair had been unsuccessful. At most, it can be said that these are questions over which reasonable men could differ, and that, as such, they were properly referred to the jury.

The shipowner refers us to Calderola v. Cunard S.S. Co., 279 F.2d 475, Smith v. Jugoslavenska Linijska Plovidba, 278 F.2d 176, (C.A.4, 1960), Weigel v. The M V Belgrano, 188 F. Supp. 605, (D. Ore. 1960), and Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Calif. 1959), affirmed, 274 F.2d 875 (C.A.9), cert. denied, 363 U.S. 803 (1960), which can be readily distinguished, for in none of those cases did the shipowner,

as was true here, assure the stevedoring company that the known defects had been repaired.

In the alternative, the shipowner seeks a new trial, contending that the district court's charge was prejudicial because it allegedly limited the jury to finding the stevedoring company liable only if it caused the unseaworthy condition, when the jury, under the holding in Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423 (1959), could have found liability if the stevedoring company brought into play the unseaworthy condition and the injury resulted as a foreseeable consequence thereof. But we think that the charge given was full and correct, for the district court specifically said,

> "Then you come to the other problem. If you should conclude that this ship was unseaworthy because the winch was not in proper order, or for some other reason, or that the shipowner was negligent in the manner in which he maintained the ship or provided a place for this man to work, then and only then would you come to the problem of the stevedoring company. If that condition existed, did something that the stevedoring company do—and when I say 'company,' of course I mean the company's employees, its representatives, anyone there on behalf of the company—have anything to do with this? Did any of them do anything which caused this unseaworthy condition?
>
> Or did they create a situation by which the ship became liable for these injuries to Mr. Hodgson?"

The shipowner, in any event, was not entitled to a charge in this regard, for it defended in the district court on the theory that "improper operation by Murphy's employees of a *sound and properly operating winch was the responsible cause of the accident*," and "*there was nothing whatever the matter with the winch*," thereby denying the existence of an unseaworthy condition that could have been called into play. (Emphasis supplied.)

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,397

JAMES HODGSON

v.

LLOYD BRASILEIRO PATRIMONIO NACIONAL,
Appellant,

v.

MURPHY-COOK & CO.

ON PETITION FOR REHEARING

Before BIGGS, *Chief Judge*, and MCLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed August 23, 1961)

PER CURIAM.

The petition for rehearing filed in this case presents nothing that was not fully argued and briefed heretofore and will be denied.

Chief Judge BIGGS, dissenting.

In view of Crumady v. The J. H. Fisser, 358 U.S. 423 (1959), and Waterman Co. v. Dugan & McNamara, 364 U.S. 421 (1960), it would seem inevitable that we reappraise our decision in Hagans v. Farrell Lines, 237 F.2d 477, (1956). See also Calmar Steamship Corp. v. Naci:ema Operating Co., 266 F.2d 79 (4 Cir. 1959). The case at bar is one wherein "the bring into play" doctrine is applicable and Hagans should be overruled. Judgment should be entered in favor of Brasileiro and against Murphy, or a new trial granted.

For these reasons I must dissent from the order denying rehearing en banc.